

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

RELATIONAL FUNDING CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-821-SLR
	)	
TCIM SERVICES, INC.,	)	
	)	
Defendant.	)	

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Wilmington, Delaware. Counsel for Plaintiff. Of Counsel:  
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Philadelphia, Pennsylvania.

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**MEMORANDUM OPINION**

Dated: February 14, 2003  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On December 11, 2001, plaintiff Relational Funding Corporation ("RFC") filed this action against defendant TCIM Services, Inc. ("TCIM") alleging that TCIM breached a contract under a lease by failing to provide notice of its intent to terminate the lease and by failing to return the equipment of the lease. Consequently, RFC is seeking return of the equipment, plus damages. Currently before the court is RFC's motion to dismiss TCIM's amended counterclaims. (D.I. 40) For the reasons stated below, RFC's motion to dismiss is granted.

**II. BACKGROUND**

On December 16, 1997, defendant TCIM entered into a Master Lease Agreement ("Lease"), as lessee, with Varilease Corporation ("Varilease") (a non-party), as lessor, for certain computer equipment. (D.I. 1 ¶ 5) On January 1, 1998, Varilease sold all of the equipment in dispute, assigning all of its rights, title, and interest in the Lease to plaintiff RFC through the Purchase and Sale Agreement and Assignment of Lease ("Assignment Agreement"). (D.I. 37, Ex. A))

RFC alleges that TCIM defaulted under the terms of the Lease by failing to give the required notice of its intent to terminate the Lease in accordance with Paragraph 2(b) of the Lease. (D.I. 1 ¶ 14) RFC also alleges that TCIM has defaulted under the terms

of the Lease because the majority of the equipment under the Lease has not been returned and a substantial portion of the equipment that was returned did not match the equipment that was given out under the Lease. (Id.)

TCIM has counterclaimed alleging RFC breached the Lease by failing to provide notice to TCIM of the alleged sale and assignment. (D.I. 37 ¶¶ 45-66) Counterclaims I and II allege breach of contract by Varilease and RFC. Counterclaim III alleges breach of contract under a third party beneficiary theory.

### **III. STANDARD OF REVIEW**

In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The moving party has the burden of

persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

#### **IV. DISCUSSION**

##### **A. Counterclaims I and II**

The parties' arguments rest on the face of the Lease, each emphasizing different portions of paragraph 10 of the Lease.

Under the terms of the Lease:

##### 10. Assignment

- (a) Lessee acknowledges and understands that Lessor may assign to a successor, financing lender and/or purchaser (the "Assignee"), all or any part of the Lessor's right, title and interest in and to the Lease and the Equipment and Lessee hereby consents to such assignment(s). In the event Lessor transfers or assigns, or retransfers or reassigns, to an Assignee all or part of Lessor's interest in the Lease, the Equipment or any sums payable under the Lease, whether as collateral security for loans or advances made or to be made to Lessor by such Assignee or otherwise, Lessee covenants that, upon receipt of notice of any such transfer or assignment and instructions from Lessor,
  - (i) Lessee shall, if so instructed, pay and perform its obligations under the Lease to the Assignee (or to any party designated by Assignee), and shall not assign the Lease or any of its rights under the Lease or permit the Lease to be amended, modified, or terminated without the prior written consent of Assignee; and
  - (ii) Lessee's obligations under the Lease with respect to Assignee shall be absolute and unconditional and not be subject to any abatement, reduction, recoupment, defense, offset or counterclaim for any reason, alleged or proven, including, but not limited to, defect in the Equipment, the condition, design, operation or fitness for use of the Equipment or any loss or destruction or

obsolescence of the Equipment or any part, the prohibition of or other restrictions against Lessee's use of the Equipment, the interference with such use by any person or entity, any failure by Lessor to perform any of its obligations contained in the Lease, any insolvency or bankruptcy of Lessor, or for any other cause[.]

(D.I. 1, Ex. A at ¶ 10(a)(i)-(ii))

TCIM emphasizes the portion of the Lease that states that the "Lessee covenants that, **upon receipt of notice** of any such transfer or assignment and instructions from Lessor, (i) Lessee shall, if so instructed, pay and perform its obligations under the Lease to the Assignee[.]" (Id.) (emphasis added) TCIM argues that by this language the Lease requires notice of the assignment. Absent notice, TCIM had no obligations to RFC.

RFC asserts that the counterclaims must be dismissed because "the 'hell or highwater' clause [in paragraph 10] creates an unconditional obligation to pay regardless of any defense or claim asserted by TCIM." (D.I. 42 at 1) RFC emphasizes the portion of the Lease that states "Lessee's obligation under the Lease with respect to Assignee shall be **absolute and unconditional** and not subject to any abatement, reduction, recoupment, defense, offset or **counterclaim**[.]" (D.I. 1, Ex. A at ¶ 10) (emphasis added)

Paragraph 10 of the Lease specifically grants TCIM's consent to assignment of the Lease. The Lease states "Lessee

acknowledges and understands that Lessor may assign . . . the Lease and the Equipment and Lessee hereby consents to such assignment(s)." (Id.) The Lease does not require notification of the assignment for the assignment to be valid. The Lease only requires notification for the purpose of directing TCIM's payment and performance to the proper party. Prior to notification, TCIM is performing under the Lease if it directs payment to the original lessor. The Lease does not purport to place any affirmative obligation upon the Lessor or Assignee to notify the Lessee of the assignment.

Counterclaims I and II are based on RFC as "an alleged assignee of the Lease from Varilease[.]" (D.I. 37 at ¶ 49, 52) Based on RFC as assignee, TCIM imputes Varilease's alleged breach to RFC. Assuming for the moment that RFC is an assignee of the Lease (as required by the counterclaims), the counterclaims are barred as RFC is not subject to any counterclaims "for any reason."<sup>1</sup> Assuming failure to provide notification of the assignment was a breach of the Lease, "any failure by Lessor to perform any of its obligations contained in the Lease" cannot

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<sup>1</sup>The court notes that "[t]he hell or highwater provisions [in paragraph 10], especially in light of the degree and specificity to which they explicitly waive [defendant's] right to assert setoffs, defenses or counterclaims, are generally enforceable." Wells Fargo Bank Minnesota Nat. Ass'n v. Nassau Broadcasting Partners, L.P., 2002 WL 31050850, at \*2 (S.D.N.Y. Sept. 13, 2002) (citing Citibank, N.A. v. Plapinger, 66 N.Y.2d 90, 94-95 (1985)).

form the basis for a counterclaim against an assignee. Based on the plain language of the Lease, the court finds that TCIM's counterclaims I and II are explicitly barred by the Lease, thus, TCIM has failed to state a claim upon which relief can be granted.

**B. Counterclaim III**

TCIM argues that counterclaim III is not based on the Lease, thus, the claim cannot be barred by the "hell or highwater" provision in paragraph 10. Counterclaim III is based on TCIM as a third party beneficiary to the Purchase and Sale Agreement and Assignment of Lease ("Assignment Agreement") between RFC and Varilease. RFC asserts that TCIM is not a third party beneficiary under the Assignment Agreement.

The Assignment Agreement is governed by Illinois law. (D.I. 37, Ex. A at ¶ 10(f)) The Assignment Agreement provided for RFC and/or Varilease to give notice to TCIM of the assignment. (Id. at ¶¶ 5, 8, 10) By virtue of the notice provisions, TCIM asserts that it is a third party beneficiary to the Assignment Agreement. (Id. at ¶¶ 62-64) This argument is without merit. Third party beneficiary law in Illinois has been summarized as follows:

In Illinois, the promisor's intention must be evidenced by an express provision in the contract identifying the third-party beneficiary. Whether a party is a third-party beneficiary depends on the intent of the contracting parties and is determined on a case-by-case basis. In making this determination, it must appear from the language of the contract when properly construed that the contract was made for the direct

benefit of the third person and that the benefit was not merely incidental. There is a strong presumption that the parties to a contract intend the provisions of that contract to apply only to them and not to third parties. In order for a plaintiff third party to have standing to sue under a contract, the contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear. Liability to a third party must affirmatively appear from the contract's language and from the circumstances surrounding the parties at the time of its execution and cannot be expanded or enlarged simply because the situation and circumstances justify or demand further or other liability.

McCoy v. Illinois Intern. Port Dist., 778 N.E.2d 705, 712 (Ill. App. Ct. 2002) (internal citations omitted).

The notice provisions of the Assignment Agreement do not indicate an intention that the Assignment Agreement was made for the direct benefit of TCIM. Rather, it is clear from the Assignment Agreement that the contract was not for the benefit of TCIM. The Assignment Agreement was for the benefit of RFC and Varilease. As a matter law, TCIM is not a third party beneficiary under the Assignment Agreement. Thus, counterclaim III does not state a claim upon which relief can be granted.

## **V. CONCLUSION**

For the reasons stated, TCIM has failed to assert a counterclaim upon which relief can be granted. RFC's motion to dismiss the amended counterclaims is granted. An appropriate order shall issue.



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**O R D E R**

At Wilmington, this 14th day of February, 2003, consistent with the opinion issued this same day;

IT IS ORDERED that plaintiff's motion to dismiss defendant's amended counterclaims (D.I. 40) is granted.

Sue L. Robinson  
United States District Judge